SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; AND BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners, and Appellees Below,

vs.

BARNEY E. GASKILL, ET AL.,

Respondents and Appellants Below.

BRIEF OF BARNEY E. GASKILL, ET AL., IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

NELSON C. PRATT
BARNEY E. GASKILL,
GEORGE BURGER,
S. L. WINTERS,
Counsel for Respondents and Appellants Below.

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STATEMENT OF MATTER INVOLVED

The opinion against which the petition for writ of certiorari is desired is found on Page 72 of the Transcript of Record, and also reported in the 119 Fed. (2d), Vol 1, dated June 2, 1941, Page 105, clearly holding that this was an action brought by some 41 conductors and trainmen belonging to a class or group of employees who sought a judgment that they were entitled to perform work of conductors and trainmen under contracts executed with the railroad company, notwithstanding the claim of any individual did not amount to $3000.00, where aggregate claims of all trainmen greatly exceeded that amount, and

before individual rights could be determined, the rights of the group had to be ascertained.

The plaintiffs in the court below sought to have their seniority rights *restored to them*, and they had alleged that the railroad company had taken them away from them, and gave them to another group of employees, and that group was made a party to that proceeding by serving notice on one, George Kimball, as representative of that class, so that he might, if he so desired, set forth their claims in order that there might be a full determination of the rights of all parties in one proceeding, and thus avoid placing the defendant railroad company or its trustee beyond the danger of having to respond twice for the same damage.

As shown by the opinion it was alleged in our petition below, that the rights of the individual plaintiffs, members of the Nebraska Trainmen's Division, *in respect to each other*, are fixed by so-called seniority rules by which defendant Trustee is bound, and that such individual rights are ascertainable by computation, but that the right of each is related to the right of the others, and that all of the members are necessary parties to such a determination. Plaintiffs sought to have determined, that the defendant railroad company and its Trustee had been obligated by the contract to allot the said work to the members of the Nebraska Division of Trainmen, including the plaintiffs. The plaintiffs prayed that an accounting be made of the amount and cost of the work that should have been allotted to the Nebraska Division, but which had been wrongfully allotted to others, and that the amount of work that each of the plaintiffs had been wrongfully deprived of be determined, and that judgment be given each of the plaintiffs for such

an amount as he would have earned if his right to perform the work had not been wrongfully denied him.

The plaintiffs in Paragraph 8 of their petition (shown at Page 4, Transcript of Record filed herein), alleged that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs over the Northwestern Railroad from Omaha, Nebraska, to Sioux City, Iowa. That the trains as run between these two points comprise interdivisional runs by reason of the fact that the trains move over 31.3 miles of the Nebraska Division, or 30.7% of the distance between the two points, Omaha and Sioux City, Iowa, and that when trains are operating over two or more seniority districts the conductors and brakemen of the district involved are entitled to seniority rights on mileage percentage basis on miles run over each seniority district.

The plaintiffs further alleged that up to May 1, 1930, this was the basis upon which the seniority rights were recognized and enforced, but that on May 1, 1930, the defendant railroad company and its successor defendant trustee has refused to assign to plaintiffs any of the work over the trackage over the two points above referred to, although they have been frequently requested so to do, but that on the contrary have given to the Sioux City Division all of said work, which should have been divided proportionately as above alleged between the Sioux City Division and the plaintiffs herein, although the plaintiffs have at all times been on the regularly assigned list showing their seniority rights, and have been ready and willing at all times to perform said train service over the Nebraska

Division, between Omaha, Nebraska, and California Junction, Iowa, on said interdivisional train runs.

They further alleged that the railroad company and its Trustee, claimed that the rights herein sought to be enforced by the plaintiffs under their seniority rights have been abrogated by an alleged agreement between the said defendant railroad trainmen, and the Order of Railway Conductors above referred to, which new alleged agreement they claim had cut off the rights of plaintiffs to their proportionate share of the work as herein complained of, but these plaintiffs alleged further that the seniority list under which they claimed had been yearly prepared and published by the railroad company, and its Trustee above referred to gives the names of all the employees in the Nebraska Division together with the dates of their seniority.

Prayer of Petition

The prayer of the petition was that they be restored to their seniority rights as herein set forth, and that an accounting be had of the amounts due the various plaintiffs herein in the order of their seniority rights, and the defendant railroad company be compelled to produce its record showing the traffic handled and by whom handled, and the amount of work done, and judgment be rendered against the defendant railroad or its Trustee in favor of each individual plaintiff for the amount found due him, AND THAT IN THE FUTURE THE RAILROAD OR ITS TRUSTEE BE COMPELLED TO ASSIGN TO THE PLAINIFFS IN THE ORDER OF THEIR SENIORITY THEIR RIGHTS TO OPERATE ON THE RUNS IN CONTROVERSY, AND THAT THE DEFENDANT, GEORGE

KIMBALL, REPRESENTING THE SIOUX CITY, IOWA, TRAINMEN DIVISION BE COMPELLED TO RECOGNIZE PLAINTIFFS' SENIORITY RIGHTS IN SAID WORK BY THE SIOUX CITY DIVISION, WHICH HAS RESULTED IN LOSS OF TIME AND MONEY TO THE PLAINTIFFS, AND THAT THEY BE REIMBURSED FOR SAID TIME AND MONEY LOST AS HEREIN PRAYED, AND THE DEFENDANTS ALSO BE COMPELLED TO RECOGNIZE SAID RIGHTS UNTIL SAID RIGHTS SHALL BE RIGHTFULLY TERMINATED BY THE PARTIES HERETO, AND THAT THEY HAVE SUCH OTHER AND FURTHER RELIEF AS MAY BE JUST AND EQUITABLE IN THE PREMISES. (See Transcript of Record Page 4 to 7 Inc. for Petition and Prayer.)

How Case Was Decided

Issues were joined by the trustee, but all party defendants questioned the jurisdiction of the district court as to the amount in controversy, diversity of citizenship being conceded. The sole question tried out by the District Court was the question of whether or not the amount in controversy was sufficient to give the court jurisdiction. The District court found that the claims of the plaintiffs were separable and could not be aggregated to make up the jurisdictional amount, and that no plaintiff had shown the requisite amount involved as to his claim, and for that reason *only*, the case was dismissed for want of jurisdiction.

The circuit court in its opinion held that the criterion adopted for determination of the matter in controversy in the action and the value thereof was erroneous. The court saying, that the essential matter in controversy disclosed

by the pleadings and the evidence is the right of the members of the Nebraska Division of Trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad *described in the complaint.*

Allegation in Complaint Controls

As before set out the stretch described in the complaint was 31 and a fraction miles, while the affidavits filed by the defendants were confined to only 7 and a fraction miles, and it is our contention that the allegation in the *complaint controls.*

The railroad has denied the right and does now, and will continue to deny the Nebraska Division of Trainmen, that is the class or group of workmen which asserts and claims it. That is the dispute and that defines the essential matter in controversy. Under these circumstances the issue on jurisdiction is the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim the several contracts of the railroad have alloted to the Nebraska Division of Trainmen. Although no individual plaintiff has yet lost the sum of $3000.00 through being deprived of the claimed right to do the work, the testimony very clearly establishes that the amount involved in the controversy, as we have stated it, does greatly exceed the jurisdictional requirement. The trainmen and conductor wages on the designated runs for the life of the contracts will greatly exceed $3000.00.

The court went on to say, that the principles that governed in *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. C. R. 725, were applicable to this case and required the court to hold that the matter in controversy, the value of the aggregate

rights of all the members of the Nebraska Division of Trainmen to be alloted work while the alleged contracts continue and to recover a sum of money as damages for work heretofore wrongfully denied them, exceeds $3000.00 in value and that the case is within federal jurisdiction. The court went on to say, that the prohibition against doing the work is against the class and the plaintiffs constitute the class. That the railroad has not prohibited the plaintiffs from membership in the Nebraska Division of Trainmen, but the reason for its refusal of the work to the plaintiffs is that another Division of Trainmen, and not the Nebraska Division, is entitled to that work. They go on to point out that no individual plaintiff can obtain any relief in the action until their collective right as a class is established. The common and collective right of the conductors and trainmen to recognition by the railroad of their Nebraska Division of Trainmen is fairly analogous to the common and collective right of the authors and publishers to preserve the immunity of their society from the action of the state of Florida in *Gibbs* v. *Buck, supra.* As in the Gibbs case, these plaintiffs have a common and undivided interest in the matter of establishing the right of their class. The aggregate value of the work claimed by the class is therefore the criterion for jurisdiction.

The court very specifically points out that they have not considered any question *going to the merits of the case* or the *sufficiency of the pleadings.* The *sole question* being, the *question of jurisdiction raised on the appeal.*

POINTS AND AUTHORITIES

The jurisdiction conferred on the Supreme Court to review decrees of the Circuit Court of Appeals on certiorari, was not conferred to give the defeated parties another hearing, but to secure uniformity of decisions, and to bring up cases of importance which it is in the public interest to have decided by the court of last resort.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 43 S. C. R. 531.

Federal Trade Commission v. *American Tobacco Co.*, 274 U. S. 543, 47 S. C. R. 663.

On certiorari the Supreme Court will limit its consideration of the case to the questions specifically brought forward by the petition for the writ, and the brief supporting is not part of the petition, at least for the purpose of stating the question on which review is sought.

General Talking Pictures Corp. v. *Western El. Co.*, 304 U. S. 175, and (546), 58 S. C. R. 849, rehearing denied, 59 S. C. R. 116 and 355.

Southern Power Co. v. *North Carolina Pub. Ser. Co.*, 263 U. S. 508, 44 S. C. R. 164.

U. S. v. *Johnston*, 268 U. S. 220, 45 S. C. R. 496.

Rorick v. *Devon Syndicate*, 307 U. S. 299, 59 S. C. R. 877 (879).

National Licorice Co. v. *Nat'l. Labor Board*, 309 U. S. 350, 60 S. C. R. 569.

Where there is no conflict between Circuit Courts of Appeals petition for writ on that ground will not be granted.

Layne Corp. v. *Western Well Works*, 261 U. S. 387, 43 S. C. R. 422.

Crowell v. *Benson*, 285 U. S. 22, 52 S. C. R. 285 (298).

The Supreme Court will not ordinarily grant certiorari to review judgment based solely on questions of fact.

National Relation Board v. *Waterman*, 309 U. S. 206, 60 S. C. R. 493. Rehearing denied 309 U. S. 696, 60 S. C. R. 611.

Nor will the writ be granted to review the evidence or inferences taken from it.

General Talking Pictures Corp. v. *Western Electric Co.*, supra.

Questions of fact are not of sufficient importance or of public interest, and are not certifiable.

Federal Trade Commission v. *American Tobacco Co.*, 274 U. S. 543, 47 S. C. R. 663.

It is elementary that on a motion to dismiss for want of jurisdiction the court will not ordinarily enter into a consideration of the merits of the case.

Stiegleder v. *McQuesten*, 198 U. S. 141, 25 S. C. R. 616, 25 C. Jur. Sec. 106, Page 793.

Where the jurisdictional question necessarily involves a consideration of the merits it should be tried on formal pleadings.

Illinois Central Railroad Company v. *Adams*, 180 U. S. 28, 21 S. C. R. 251.

Smithers v. *Smith*, 204 U. S. 632, 27 S. C. R. 297.

ARGUMENT

At Page 10 of the petitioners' petition and brief, they seek to go into the merits of the controversy, as to whether or not the Nebraska Division was entitled to operate on 31 and a fraction miles, or on 7 and a fraction miles, but it is our contention as set out in the lower court's opinion,

that the allegation in the *complaint* controls, and that this court will not review on an application for writ of certiorari the facts involved, and will confine itself solely to the question as to whether or not this decision is in conflict with any other Circuit Court of Appeals' opinion on like matters, or whether or not this case is such a matter of importance that the Supreme Court will assume jurisdiction on account of the public interest and pass upon the question.

Grounds for Petition of Certiorari

The reason set out on Page 7 of petitioners' petition and brief is first, that the decision of the Circuit Court of Appeals for the Eighth Circuit as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. (2d) 85, and *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood* v. *Natl. Bk. of Lima*, 115 Fed. (2d.) 861.

Case Not in Conflict With Circuit Court of Appeals Case

Our answer is that none of those cases involve a decision *on the same matter*, nor are they in conflict with this case.

In *Atwood* v. *Natl. Bk. of Lima*, 115 Fed. (2d.) 861, there was a suit commenced by certain beneficiaries to have their interest in certain trust fund determined, nominating the trust and directing the defendant to pay to *each* plaintiff *his* or *her* part of said trust estate. The court rightfully held, that those were separable controversies. That while

the trust was unitary the ascertained right of each of the heirs or next of kin to share in it was single and separate, as there was no allegation that any one had $3000.00. The court rightfully held, that their claims could not be aggregated, and the case was reversed to allow an allegation to be made as to any one having $3000.00 involved or not. That there was no *common interest involved* in that lawsuit. They distinguished, however, a case in the 16 Fed. (2d.) 744, where was involved a partition suit of lands where all heirs were clearly indispensable. As their rights had to be determined among themselves and the value of the lands to be partitioned determined by the amount in controversy.

In *Central Mexico Light & Power Co.* v. *Munch*, 116 Fed. (2d.) 85, a suit was brought by a corporation and its associated companies, to enjoin an action on matured bonds secured by certain due and unpaid first mortgages. The plaintiffs claimed to represent all who had any interest in the controversy, there were allegations of conspiracy among the bondholders to obtain an inequitable advantage, and fraud was also alleged. The court held, that there was no proof of conspiracy, nor of fraud. That without such showing an aggregation of the claims would not be justified, particularly in absence of showing that the action would have brought about the alleged result. The court said, that no *joint* or *common* interest was shown, and they simply asked for an adjudication as to the various rights of the parties, and as there was no $3000.00 requisite as to any one of the parties, the Federal Court had no jurisdiction.

In *Hackner* v. *Guaranty Trust Co.*, 117 Fed (2d.) 95, the court held, while the interest of all are common and in-

volve a common question of law and fact, the record showed that the plaintiffs each had a separate and distinct demand, but simply joined in a single suit and asked individual judgments and division of the various amount to the rightful owner. The court held, that there was no joint right involved, and that clearly each plaintiff in that case must show that he himself was misled, and as a result he suffered loss. The court saying, that aggregation to make amount is permitted only when it is sought to enforce a single title or right in which *plaintiffs have a common interest.* Distinguishing the Pinel case cited, *Shields* v. *Thomas,* and *Troy Bank* v. *Whitehead,* which we will refer to later.

Nor With Decision of Supreme Court

In their second ground set out in the petition the petitioners claim that this case is in conflict with the distinction made by two decisions of this court rendered on the same day, namely, *Gibbs* v. *Buck,* 307 U. S. 66, *Clark* v. *Gray,* 306 U. S. 583, and *Hansberry* v. *Lee,* 311 U. S. 32.

In the *Clark* v. *Gray* case, 306 U. S. 583, 59 S. C. R. 744, the suit was brought to test the validity of the Caravan Act of California, not a Federal Statute. Appellees, numerous individuals, co-partners, and corporations joined in bringing the present suit against appellants, charged with the duty of enforcing the act, and praying for an injunction. The rights of each were only a small amount, but the suit was brought to enjoin appellants from collecting the fees and enforcing the provisions of the statute. The District Court held, that the amount involved was in excess of $3000.00. A motion of appellants in the court below to dismiss the bill for want of jurisdictional amount was with-

drawn, and the jurisdiction was not challenged by the parties in the Supreme Court. But on the argument in the Supreme Court it appeared doubtful whether the matter in controversy exceeded the sum or value of $3000.-00. The court itself raised the question. The court said, as it is plain, although the petition alleged generally that the amount involved was in excess of $3000.00, it was insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having *no joint or common interest, or title in the subject matter of the suit.* And the bill on its face showed that each appellee maintained his own separate and independent business, which is said to be affected by the challenged fees, that *no joint or common interest in the subject matter of the suit is shown.* The court going on to say, "It is a familiar rule, that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount, to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy the jurisdictional requirements. And that as the claim due any single plaintiff did not exceed the jurisdictional amount, it was insufficient to show that the District Court had jurisdiction as to all except one plaintiff, who did make that showing, they dismissed the case for want of jurisdiction, as to all plaintiffs except Paul Gray."

In the *Gibbs* v. *Buck case,* 307 U. S. 66, 59 S. C. R. 725, which was an appeal from an order of a three judge court refusing to dismiss the bill on motion for failure to set out facts to show Federal or Equity jurisdiction, and granting an injunction against the enforcement of a Florida Statute aimed at combinations fixing the price for the privilege

of rendering privately or publicly for profit copyrighted musical compositions. The complainants were the American Society of Composers, Authors and Publishers, and Buck as president of the Society. The suit was brought on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practical to join them as plaintiffs in a matter of *common and general interest*. There was a formal allegation that the matter in controversy exceeded $3000.00, exclusive of interest and costs, and in addition the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000. Appellants moved to dismiss on the ground that it affirmatively appears from the allegations of the bill that the jurisdictional amount of $3000.00 is not involved, in that it appears that the suit is brought for the benefit of the American Society of Composers, Authors and Publishers, and it does not affirmatively appear that the loss of *any member* of said society due to the enforcement of the challenged act would amount to the necessary jurisdictional amount. The court laid down the rule that under the complaint Federal jurisdiction will be adequately established if it appears that for any member, who is made a party, the matter in controversy is of the value of the jurisdictional amount, or IF TO THE AGGREGATE OF ALL THE MEMBERS IN THIS REPRESENTATIVE SUIT, THE MATTER IN CONTROVERSY IS OF THAT VALUE. The court saying, that they have a common and undivided interest in the matter in controversy in this class suit. Citing *Troy Bank* v. *Whitehead*, 222 U. S. 39, and that under the circumstances in that case, the issue on jurisdiction is the value of the right to conduct the business free of the prohibition of the statute.

It is our contention that this rule is applicable here, as we are seeking the protection of our seniority rights taken from us by the railroad company and the unions and transferred to the Sioux City Division, and that, therefore, the amount in controversy is not only the aggregate amount that each individual has already suffered, but the aggregate amount they will suffer in the future arising out of a common interest still undivided that they have in said seniority rights. These rights cannot be adequately asserted in individual suits brought by each one of the plaintiffs, because before they can have their seniority rights determined the co-plaintiffs are entitled to be heard as to whether they are entitled to those rights and also Kimball and his division if he so desired. Therefore, all the plaintiffs have been denied their common right still unapportioned in the future of their earning under said common written instrument, which guaranteed them these rights.

The only other case in which petitioners claim that this decision is in conflict is that of *Hansberry* v. *Lee*, 311 U. S. 32, 61 S. C. R. 115, 132 A. L. R. 741, but that suit was a suit to enjoin the violation of an agreement restricting the use of land, on the doctrine of res judicata, based upon a judgment in a prior suit in which they were neither parties nor in privity with any party enforcing the agreement, upon the stipulation of the parties to that suit, *contrary to the fact*, that the requirement in the agreement that it be signed by a certain percentage of the frontage owners before becoming effective had been sufficiently complied with, thereby precluding the defendants in the second suit from asserting that the agreement was never signed by the required number of frontage owners, upon the theory that the first suit was a class suit, and that the de-

fendants in the second suit were members of that class and so represented in the suit, constitutes a denial to such defendants of due process of law, where the defendants in the first suit *were not treated as a class*, and it was not shown that they were more interested in defeating than in upholding the agreement, especially since restrictive agreements of this kind create *several*, not *joint, obligations*, and the rights and interests of the various landowners under such agreements are of a dual nature and are just as likely to be conflicting as to be identical. In the former suit the defendants were not made a party, nor made a party by service of process, which violates the due process clauses of the Fifth and Fourteenth Amendments. After first stating that the general rule was, that a party is bound by the judgment, where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is *joint*, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. Citing numerous cases of the Supreme Court. The court going on to say, in such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

Nowhere in that case was the question of jurisdictional amount by aggregating the claims of the plaintiffs dis-

cussed nor considered. Attached to this case in the 132 A. L. R. is an extensive note on Class Suits and none of them apparently involve the question of jurisdictional amount, only the question as to how far members of a class can bind the remaining members.

This case, therefore, is not in conflict with any other Circuit Court of Appeals case, *involving the same matter.* Therefore, the court should not consider it on that ground.

This Case Not One of Public Importance

The remaining contention in the third and fourth ground of petitioners' petition, is, that this case is in conflict with the weight of authority, and an erroneous decision of an important question of general law, as to call for an exercise of this Court's power of supervision. Our answer to that is, that the jurisdiction conferred on the Supreme Court to review decrees of the Circuit Court of Appeals on certiorari, was not conferred to give the defeated parties *another hearing,* but to secure uniformity of decisions, and to bring up cases of importance which it is in the public interest to have decided by the court of last resort. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 43 S. C. R. 531.

Questions Not Important

Federal Trade Commission v. *American Tobacco Co.,* 274 U. S. 543, 47 S. C. R. 663, where the court held, that the question of fact in that case was not of sufficient importance or of public interest, and not certifiable.

On certiorari the Supreme Court will limit its consideration of the case to the questions specifically brought forward by the petition for the writ, and the brief supporting is not part of the petition, at least for the purpose of stating

the question on which review is sought. *General Talking Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175 and (546), 58 S. C. R. 849, rehearing denied 59 S. C. R. 116 and 355. Following *Southern Power Co.* v. *North Carolina Pub. Ser. Co.*; 263 U. S. 508, 44 S. C. R. 164. And *U. S.* v. *Johnston*, 268 U. S. 220, 45 S. C. R. 496.

Cannot Review Questions of Fact on Certiorari

Also *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 59 S. C. R. 877 (879). *National Licorice Co.* v. *Natl. Labor Board*, 309 U. S. 350, 60 S. C. R. 569.

Nor will it lie where there is no conflict between Circuit Courts of Appeals. *Layne Corp v. Western Well Works*, 261 U. S. 387, 43 S. C. R. 422, and *Crowell* v. *Benson*, 285 U. S. 22, 52 S. C. R. 285 (298).

On page 10 of petitioners' brief in a statement of the case, they seek to go into the questions to whether or not 31 and a fraction miles, or 7 and a fraction miles should be taken into consideration, and they claim that part of the mileage was operated by a separate, but it is our contention that was not involved in this jurisdictional question.

The lower court in its opinion specifically so stated where at the end of the opinion they say, "we have not considered any question going to the merits of the case or the sufficiency of the pleadings." And in another place they assume that the stretch or run of railroad described in the *complaint* is what controls, and that is our contention.

This court has announced the rule that they do not ordinarily grant certiorari to review judgment based solely

on questions of fact. *National Relation Board* v. *Waterman*, 309 U. S. 206, 60 S. C. R. 493. Rehearing denied 309 U. S. 696, 60 S. C. R. 611.

The writ will not be granted to review the evidence or inferences taken from it. *General Talking Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175 and 546, 58 S. C. R. 849, rehearing denied 59 S. C. R. 116 and 355.

Therefore, this question is not involved, also because the petition does not request a review on the evidence, and there was no attempt on the part of either the district court or the Circuit Court of Appeals to pass on any question of fact, except as to the question of jurisdictional amount.

At the back of petitioners' application and brief is a diagram purporting to support petitioners' claim that this Nebraska division was only entitled to 7 and a fraction miles rather than 31 and a fraction, which is alleged in the complaint. But our answer to that is, that that question is not involved in this appeal as it is elementary, that on a motion to dismiss for want of jurisdiction the court will not ordinarily enter into a consideration of the merits of the case. *Stiegleder* v. *McQuesten*, 198 U. S. 141, 25 S. C. R. 616, 25 C. J. Sec. 106, page 793.

The rule in C. J. being as follows: "the statute referring to the judicial code confers no power to summarily decide matters in issue going to the merits of the controversy." *Smithers* v. *Smith*, 204 U. S. 632, 27 S. C. R. 297. And where the jurisdictional question necessarily involves the consideration of the merits it should be tried on formal pleadings. The rule being that a question which belongs to the merits rather than to the jurisdiction should not be

raised by motion to dismiss, but by demurrer or other pleadings in the regular process of the cause. *Illinois Central Railroad Company* v. *Adams*, 180 U. S. 28, 21 S. C. R. 251.

In the *Smithers* v. *Smith* case it is stated, "that such an authority to dismiss should not be unlimited, and its limits ought to be ascertained and observed, lest under the guise of determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury." It was held there, "that in trespass to try title to land worth more than the jurisdictional amount brought against several defendants a decision that defendants acted separately and not jointly and that the damages recoverable against each separately was less than the required amount is not a determination of a jurisdictional fact but of an essential element of the merits.

It is our contention, therefore, that there is no conflict between this decision and any other Circuit Court of Appeals decision, nor of the Supreme Court of the State, and the case is not of sufficient importance, or of public interest to warrant this court in reviewing the lower court's decision. This is not an appellate proceeding, therefore, the writ should be denied.

We do not know whether it is proper practice or not, but we would like to submit with this brief a copy of our brief filed in the lower court in which we have made an attempt to review all the cases that we were able to find on this question of aggregating or combining the claims of plaintiffs to confer jurisdiction, and we are, therefore, taking the liberty of filing those briefs together with this brief,

especially that part of the brief beginning at Page 48 and following.

Respectfully submitted,

BARNEY E. GASKILL

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SUPREME COURT OF THE UNITED STATES.

No. 139.—October Term, 1941.

Charles M. Thomson, Trustee for Property of Chicago & Northwestern Railway Company, et al., Petitioners,
vs.
Barney E. Gaskill, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 2, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The question for decision is whether the record shows an essential requisite of the jurisdiction of the District Court, namely, that the "matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000". Judicial Code, § 24(1), 28 U. S. C. § 41(1). There were other questions which, in the view we take of the case, need not be stated.

Respondents, forty-one conductors and brakemen employed by the Chicago & Northwestern Railway Company, brought suit against the railroad and one Kimball, an employee of the road, in the United States District Court for the District of Nebraska. The complaint alleged that the plaintiffs "belong to" the trackage of the railroad called the Nebraska Division; that "the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa"; that trains running between these points moved over 31 miles of the Nebraska Division and 70 miles of the Sioux City Division; that prior to May 1, 1930, seniority rights of the plaintiffs were governed by certain contracts "referred to sometimes as the 'Schedule of Wages and Rules of Compensation for Conductors and Trainmen' ", which provided that when trains were operated over more than one seniority district, the "percentage of miles run over each division will govern in assignment to such runs"; that since May 1, 1930,

the railroad has assigned all of the work on the Omaha-Sioux City run to the Sioux City Division; that although the railroad insists that the plaintiffs' seniority rights have been abrogated "by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors", the plaintiffs are not bound by such agreement; and that on account of the "wrongful deprivation" of their seniority rights, the plaintiffs have been damaged in excess of $3,000.

The railroad's answer stated that the plaintiffs had only such seniority rights as were derived from agreements between the railroad and the Order of Railroad Conductors and the Brotherhood of Railroad Trainmen; that the agreements could be abrogated or modified by the railroad and the unions without the consent of the plaintiffs; that the track between Omaha and Blair, located on the Omaha-Sioux City run, was not part of the Nebraska Division of the railroad; that this trackage is owned by the Chicago, St. P., M. & O. Railway Company; that the only part of the Nebraska Division on the run between Omaha and Sioux City is 7.5 miles long; and that the complaint did not show the existence of the required jurisdictional amount. The District Court ordered the plaintiffs to prove that more than $3,000 was involved, and ten of them submitted affidavits. The substance of each affidavit was that since May 1, 1930, the Chicago & Northwestern had "operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts", and that "to the best of [affiant's] knowledge and ability", his loss exceeded $3,000. The defendants submitted affidavits supporting the allegations of their answers. But neither the pleadings nor the affidavits of the parties contain the terms of the various agreements referred to in the complaint and upon which the plaintiffs' action is based.

Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that "the amount in controversy as to any one plaintiff does not amount to as much as $3,000", and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs. Accordingly, the action was dismissed. The first conclusion of the District Court was not challenged either in the Circuit Court of Appeals or before us. The plaintiffs contended that their claims should be aggregated because "the rights of the plaintiffs are so interlocked and interwoven that

the rights of one cannot be determined without the others being parties thereto". The Circuit Court of Appeals reversed the dismissal, holding that the plaintiffs' claims could be aggregated for purposes of determining the value of the matter in controversy. The Court stated that although it found the complaint "very difficult of analysis", it had construed it "most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal." 119 F. 2d 105, 108. We brought the case here, 314 U. S. —, in view of the important question affecting the jurisdiction of the district courts.

The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. *Healy* v. *Ratta*, 292 U. S. 263, 270, and see *Elgin* v. *Marshall*, 106 U. S. 578, 580. Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 188-89; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278; *Gibbs* v. *Buck*, 307 U. S. 66, 72. The bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount. And our review of the District Court's determination of the jurisdictional amount must be confined to this record. *Henneford* v. *Nor. Pacific Ry.*, 303 U. S. 17, 19; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-90.

Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit "in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount". *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86; see *Shields* v. *Thomas*, 17 How. 3, 5; *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40-41; *Gibbs* v. *Buck*, 307 U. S. 66, 74-75, or one in which "the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy", *Davis* v. *Schwartz*, 155 U. S. 631, 647; see *Clay* v. *Field*, 138 U. S. 464, 479-80; *Russell* v. *Stansell*, 105 U. S. 303. Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, *Pinel* v. *Pinel*, 240 U. S. 594, or because the plaintiffs have a community of interest, *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. In a diversity litigation the value of the "matter

in controversy'' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. *Wheless* v. *St. Louis,* 180 U. S. 379, 382; *Oliver* v. *Alexander,* 6 Pet. 143, 147.

The record contains no showing of the requisite jurisdictional amount, and the District Court was therefore without jurisdiction. The judgment will be reversed and the cause remanded to the District Court without prejudice to an application for leave to amend the bill of complaint.

So ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.